

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT MILLER, SR.,

Plaintiff-Appellant,

v

CAMERON CUNNINGHAM, d/b/a
CUNNINGHAM AND ASSOCIATES,

Defendant-Appellee.

UNPUBLISHED

April 25, 1997

No. 182566

Macomb Circuit Court

LC No. 94-002365-NO

Before: Young, P.J., and Taylor and R.C. Livo,* JJ.

PER CURIAM.

Plaintiff filed this negligence action against defendant, his landlord, for injuries sustained during a fight in a common area of defendant's building. The fight was with two men who were residing or staying with another tenant of the building. The trial court held that defendant did not have a duty to protect plaintiff and granted summary disposition to defendant pursuant to MCR 2.116(C)(10). Plaintiff appeals as of right. We affirm.

We review the trial court's decision to grant summary disposition to defendant pursuant to MCR 2.116(C)(10) de novo. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996). Summary disposition should be granted under MCR 2.116(C)(10) if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). The trial court is required to review the pleadings, affidavits, depositions, admissions and any other documentary evidence. After reviewing the evidence and all reasonable inferences drawn from the evidence, the court must decide whether there is a genuine issue of material fact present to allow the case to proceed to trial. *Baker, supra*, 215 Mich App 202.

Defendant moved for summary disposition on the ground that he did not owe a legal duty to plaintiff on the facts of this case. The question of duty is one of law for the court. If no legal duty exists, then summary disposition is appropriate. *Schmidt v Youngs*, 215 Mich App 222, 224-225; 544

* Circuit judge, sitting on the Court of Appeals by assignment.

NW2d 743 (1996). In this case, the trial court was required to look beyond the pleadings to determine whether a question of fact existed regarding the foreseeability of the risk of harm resulting from third party criminal acts. *Holland v Liedel*, 197 Mich App 60, 63; 494 NW2d 772 (1992). Plaintiff failed to show that there was a genuine issue of material fact to avoid summary disposition.

Plaintiff was assaulted during a fight involving two guests of another tenant of the building where plaintiff resided. Plaintiff's theory was that defendant, as the landlord, knew of the violent propensities of both of these men and defendant should have taken action before the date of the fight to ensure that these men were removed from the premises for the safety of the tenants of the building. In support of his theory, plaintiff produced an affidavit in which he detailed past incidents with these men. He also averred in the affidavit that he informed defendant of the problems these men were causing in the building.

Plaintiff's affidavit contradicts his prior deposition testimony in which he characterized his relationship with both men as amicable and neighborly, with the exception of one incident where one of the men tried to sell plaintiff's truck. It is well settled that a party may not raise an issue of fact by submitting an affidavit that contradicts his prior clear and unequivocal testimony. *Gamet v Jenks*, 38 Mich App 719, 726; 197 NW2d 160 (1972). Hence, the trial court could disregard the contradictory affidavit in deciding the motion for summary disposition. *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 256-257; 503 NW2d 728 (1993).

As such, plaintiff presented no evidence that defendant knew or should have known that the commission of criminal acts by these two men was foreseeable and that defendant failed to take reasonable care to keep the physical premises under his control reasonably safe. *Stanley v Town Square Cooperative*, 203 Mich App 143, 148-150; 512 NW2d 51 (1993). There was no evidence that either of these men were aggressive or violent towards other tenants. Plaintiff's prior incident with one of the men, over the attempted sale of plaintiff's truck, did not involve actual or threatened violence. Since no evidence supported plaintiff's theory that it was foreseeable to defendant that these men were a threat to tenants of the building, no factual dispute exists regarding whether defendant allowed dangerous conditions to exist in his building as he had no reason to suspect that these men presented a safety risk to the building's tenants. Therefore, defendant was properly granted summary disposition.

The trial court ruled it was dismissing plaintiff's case because defendant did not owe a duty to plaintiff. While the trial court made some comments about its dislike for this type of case, the court's decision to dismiss this matter was premised upon a valid and correct legal ruling.

Plaintiff included a second count in his complaint for breach of his lease agreement in relation to the assault, but he has not presented any argument on appeal related to the trial court's dismissal of that claim. Therefore, as this issue is abandoned, the lower court properly dismissed plaintiff's entire complaint on summary disposition.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Robert P. Young, Jr.
/s/ Clifford W. Taylor
/s/ Robert C. Livo

